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ARTICLES

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Introduction

"Freedom of parental choice in education!" is a battle cry now being heard not only nationally but with special intensity in Pennsylvania. The movement sounding that cry springs from several causes: the opinion of many parents that public education is failing in moral and academic quality; parents' belief that private education provides a superior alternative; and the widespread revival of dedication to the religious formation of children accompanied by fervent support of religious schools.[1] The pleaders for "school choice" are met, at the outset, by those who

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1. While Catholic schools, for the past century and a half, have had the predominant religious school population, evangelical Protestant schools, experiencing a phenomenal growth since 1970, now form a significant part of the national private school picture. Schools of the (evangelical) Association of Christian Schools International rose in numbers from 1,294 in 1979 to 3,400 in 1996. In 1955 there were 180 Orthodox Jewish schools nationwide; today there are more than 500. A similar growth pattern obtains in Pennsylvania.

ask how any reasonable person can contend that parents in Pennsylvania today do *not* have such freedom. They point out that no Pennsylvania law forbids parents to choose private, including religious, schools. No Pennsylvania law bars establishing and operating such schools.[2] Furthermore, the right of parents to choose such schools for their children has long been held to be a constitutional right.[3]

In response to these arguments, school choice proponents make several points. First they argue that private schools, as well as public schools, provide education for children. By attending a private school, a child may obtain the full measure of education that the law and public policy require. Second, the choice of public school is paid for out of public funds. The parent who makes the choice of the other equally, and sometimes better, qualified private school must pay for it personally while yet paying tax to support the public school he or she does not elect to use. Third, compulsory attendance laws require all parents to choose either public or private schooling. Fourth, education today is extremely expensive and, hence, for many of those citizens who choose private schools for their children, severely burdensome. The economic inequality between the decision to choose public education and the decision to choose private education provides the basis for the claim that, generally, parents who desire nonpublic education for their children do not really have freedom of choice in education. This lack of freedom has given rise to the present movement to obtain legislation whereby parents would receive state financial assistance popularly called "vouchers," or "school choice" grants.

Historically, pleas for public aid in furtherance of parental choice of private education have sought direct aid to the schools. Further, due to the fact that most of the pleaders were supporters of Catholic schools, the issue presented was popularly described as the "Catholic school aid question," or "parochiaid." By 1997, the terms of the debate over the issue and the identity of the pleaders have changed. The public aid now sought takes the form of aid to individual parents or to the children, not to institutions. Among

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2. Indeed since 1988, Pennsylvania law has been highly protective of religious schools, especially in terms of undue governmental regulation. *See* PA. STAT. ANN. tit. 24, § 13-1327(b)(1992).

3. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Wisconsin v. Yoder, 406 U.S. 205, 213 (1979).

the most vigorous pleaders for that kind of aid are evangelical Protestants and Orthodox Jews.[4]

Opponents of the former programs of direct governmental aid to religious schools do not regard programs now couched in terms of educational aid to parents or children as different when considered in light of provisions of federal and state constitutions which, some claim, bar the former. While appearances show a growing consensus that the Constitution of the United States provides no such bar, many traditional opponents of parental choice programs now resort to state constitutions as the means for defeating proposals for such programs.[5] This article focuses on the constitution of one state, Pennsylvania, and analyzes the provisions that some critics contend would render void the principal parental choice programs now being proposed in that state.[6]

I. The Constitutional Roots

The four constitutions of Pennsylvania[7] represent, in an important sense, a continuity of emphasis upon the importance of religion in our society and a concern for religious liberty. The frame of government set forth in the Constitution of 1776 spoke of the importance of "laws for the encouragement of virtue and prevention of vice and immorality" and concluded that religious societies should therefore be encouraged.[8] William Penn's *Frame of Government For Pennsylvania* had sought the creation of schools for the benefit of the public.[9] A colonial statute of 1683 according-

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4. The Lutheran Church, Missouri Synod, had long campaigned for economic freedom of parental choice in education, but today such evangelical groups as the National Association of Evangelicals and the Southern Baptist Convention have vigorously joined in taking a similar position.

5. *See, e.g.*, PUBLIC EDUCATION COALITION TO OPPOSE TUITION VOUCHERS, STATE FUNDING OF PENNSYLVANIA'S PRIVATE AND PAROCHIAL SCHOOLS (1994); John Paul Jones, *Pennsylvania's Choice: 'School Choice' and the Pennsylvania Constitution*, 66 TEMP. L. REV. 1289 (1993).

6. "The Pennsylvania Constitution clearly prohibits the state from paying tuition vouchers for private and religious schools, regardless of whether the vouchers are funneled through the parent or pass directly to the schools." *Tuition Vouchers: Testimony Before the House Education Committee*, 179th Legis. 5 (Pa. 1995)(statement of Annette Palutis, President, Pennsylvania State Education Association).

7. "Four" depending upon whether the Pennsylvania Declaration of Rights of 1776 is regarded as the first constitution of the Commonwealth.

8. J. PAUL SELSAM, THE PENNSYLVANIA CONSTITUTION OF 1776: A STUDY IN REVOLUTIONARY DEMOCRACY 181 (1936).

9. J.P. WICKERSHAM, A HISTORY OF EDUCATION IN PENNSYLVANIA 39 (1886).

ly provided that such schools would train children to be able to read the scriptures.[10] The Act of April 12, 1838, continued the theme of the use of public funds to support religious educational organizations and stated:

> Section 13. When a free school of the Common School grade, shall hereafter be maintained in any accepting school district, under the care and direction of a religious society, it shall be lawful for the school directors of such district to cause to be paid to the proper person or persons, for the support of such school, any portion of the school money not exceeding the rateable share of the taxable inhabitants whose children or apprentices shall be taught in such school: *Provided*, That the directors shall be satisfied that such application of the money would not upon the whole, be injurious to the Common Schools of the district.[11]

Thus Pennsylvania, from its earliest days, recognized the importance of schools that provide religious education along with secular education.

In 1872 Pennsylvania's fourth constitutional convention assembled.[12] It would continue the insistence of prior constitutions on recognition of God, stating, in the new preamble, gratitude "to Almighty God for His blessings of civil and religious liberty" and invoking God's guidance.[13] But a new sentiment of animosity had developed on the subject of subsidizing religious schools.[14] The reasons were twofold. One related to the Catholic Church, and the other to Protestantism. The 19th Century had witnessed a virtual explosion in the Catholic population of the nation.[15] This explosion was unwelcome in the originally, and still solidly, Protestant United States.[16] A strength of the Catholic Church was

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10. *Id.*

11. Act of April 12, 1838, No. 37 § 13, 1837-38 Pa. Laws 332, 336 (repealed).

12. A.D. HARLAN, PENNSYLVANIA CONSTITUTIONAL CONVENTION 1872 AND 1873: ITS MEMBERS AND OFFICERS AND THE RESULT OF THEIR LABORS 22 (1873).

13. *Id.* at 107.

14. WILLIAM BENTLEY BALL, MERE CREATURES OF THE STATE: EDUCATION, RELIGION, AND THE COURTS: A VIEW FROM THE COURTROOM 21 (1994).

15. *Id.* at 21-22.

16. In summary:

> In the early 19th century hatred of the Catholic Church, preached as "No Popery" in pulpits and learned in family life, became hatred of Catholics when unwelcome boatloads of poverty-stricken Irish began arriving at the ports of Boston and New York after 1820. Not readily assimilable, these immigrants were deemed obnoxious cultural aliens; worse, they became a public burden in almshouses. As

its school system, which the Church's leaders felt was necessary to safeguard the Catholic faith and to protect Catholic children against efforts made in the common schools to convert them to Protestantism.[17] But as the Catholic schools grew along with the Catholic population, Protestant majorities in state after state resolved to bar this burgeoning factor in American society from participating in the public funding that had long been afforded the predominantly Protestant religious schools.[18] That funding had declined as, after the mid-19th century, the common or public schools began to flourish.[19] Education in the common schools was state-aided in Pennsylvania, but that aid diminished after 1834 when the Free School Law came into existence.[20]

The common schools were essentially Protestant in character. They were characterized by a well-articulated Protestant work ethic, the employment of Protestant devotions, use of the King James Bible and a generally Protestant orientation in the teaching of history, the selection of literature and the religious attitude of Protestant teachers. This orientation characterized the public schools until well into the 20th century, and in 1872 it was pervasive. It provided a powerful assurance to Protestant members of the new constitutional convention that, if they were to amend the Constitution to bar funding religious schools, they would not thereby bar funding to schools of Protestant orientation. The members of the constitutional convention probably never imagined a religion-free, secularist public school.[21] Amending the Constitu-

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> the century wore on, Catholics slowly found frigid acceptance in the Protestant American society, always carefully limited by Protestant rejection of their Church and intense dislike of Catholic separateness. Catholic separateness derived from their Church's stern rejection of Protestantism, the forbidding of marriage with Protestants except upon conditions unacceptable to most Protestants, and its insistence on building its own social institutions, especially schools.

Id.

17. THEODORE ROEMER, THE CATHOLIC CHURCH IN THE UNITED STATES 288-90 (3d ed. 1954).

18. HAROLD A. BUETOW, THE CATHOLIC SCHOOL: ITS ROOTS, IDENTITY AND FUTURE 24 (1958).

19. WICKERSHAM, *supra* note 9, at 388.

20. *Id.*

21. Horace Mann, the nineteenth century's great exponent of American public schools, opposing all sectarian instruction in the public schools, nevertheless saw the public school system as one which "earnestly inculcates all Christian morals," and he vigorously denied that he had "even attempted to exclude religious instruction from the schools, or to exclude the Bible from the schools, or to impair the force of that volume." 2 ANSON PHELPS STOKES, CHURCH AND STATE IN THE UNITED STATES 57 (1950).

tion would at once stem the tide of demands of the Catholic schools to participate in public funds and assure the continuation of essentially Christian education. The convention thus adopted Article III, Section 18, barring appropriations for charitable, educational or benevolent purposes to sectarian institutions and Article III, Section 17, barring use of public school funds for the support of sectarian education.

While a limited Constitutional Convention meeting in 1967 produced Pennsylvania's fifth constitution, it effected no change in the 1874 clauses relating to religion. Opponents of programs of public aid to parents to support education for their children in private schools have focused on three of those clauses (as renumbered in 1967): Article I, Section 3; Article III, Section 15 (the former Article III, Section 17); and Article III, Section 29 (the former Article III, Section 18).

II. The "Parental Choice" Proposal

For purposes of understanding the present "school choice" controversy in Pennsylvania, a summary of the salient features of "parental choice" proposals being considered is useful.[22]

A. Justification of the Measure as Public Policy

The proposal provides findings that it is "the policy of the Commonwealth to enhance the primary right and obligation of parents to choose the education and training of their school-age children", and that "[a]n educated populace is essential to the political and economic health of the Commonwealth."[23]

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22. These are the features common to measures proposed in the General Assembly in prior years and in recent proposals of Pennsylvania Governor Thomas Ridge and the House Republican majority. *See, e.g.*, H.R. 1655, 176th Reg. Sess. (Pa. 1993).

23. The full text of the findings is as follows:

> (1) It is the policy of the Commonwealth to enhance the primary right and obligations of parents to choose the education and training of their school-age children; (2) An educated populace is essential to the political and economic health of the Commonwealth; (3) Providing educational opportunities for the children of this Commonwealth is a governmental duty and a matter of legitimate concern; (4) The legitimate interest and governmental duty of the Commonwealth in the citizens of this Commonwealth, will better prepare these citizens to compete for employment opportunities, will foster development of a more capable and better-educated work force and will better enable the Commonwealth to fulfil its governmental duty of providing an opportunity to receive a quality education to children.

Id.

B. Cash Grants to Parents of Children Attending a Public or Nonpublic School

The grants made to parents are for tuition and derived from appropriations made by the General Assembly. The parent must be a person whose taxable income is within a defined low level. The nonpublic school must meet the requirements of the compulsory school attendance law and the applicable requirements of Title VI of the U.S. Civil Rights Act of 1964.

III. The 1996 "Parental Choice" Proposal In Light Of The Pennsylvania Constitution

A. Article I, Section 3: Non-Establishment

Article I, Section 3 is often described as the Pennsylvania Constitution's "non-establishment" clause. In relevant part, the Section provides, "[N]o man can of right be compelled to . . . support any place of worship, or to maintain any ministry against his consent; . . . and no preference shall ever be given by law to any religious establishment or modes of worship."[24] This section is regularly cited by opponents of aid to parents of children enrolled in religious schools. In *Springfield School District v. Department of Education*,[25] for example, litigants challenging the state's funding of bus transportation to such children relied in part upon that section.[26] The Pennsylvania Supreme Court thus considered whether Section 3 provided "more stringent limitation upon the church-state relationship than does the federal constitution."[27] The court stated, "[T]he limitations contained in our constitution do not extend beyond those announced by the United States Supreme Court in interpreting the first amendment to the federal constitution."[28] The court stressed the point by quoting from its earlier opinion in *Wiest v. Mt. Lebanon School District*,[29] which stated "[t]he protection of rights and freedoms secured by this section [Article I, section 3] of our Constitution, however, does

24. PA. CONST. art. I, § 3.
25. 397 A.2d 1154 (1979).
26. *Id.*
27. *Id.* at 1170.
28. *Id.*
29. 320 A.2d 362 (1974).

not transcend the protection of the first amendment of the United States Constitution."[30]

Because protection of religious freedom in Pennsylvania is coextensive with the protection provided by the First Amendment, the Supreme Court's interpretation of the non-establishment clause of the federal constitution in cases involving tax expenditures related to religious entities is relevant. Two lines of decision are apparent in these cases: (a) those barring direct subsidy of religious institutions or agencies and (b) those sanctioning the achievement of public purposes through aid to individuals served by religious institutions or agencies.

1. The subsidy cases.—Many advocates' briefs opposing forms of "parental choice" legislation have relied upon the sweeping dictum in *Everson v. Board of Education*.[31] They frequently quote Justice Black's statement that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions" because the Establishment Clause was "intended to erect 'a wall of separation between Church and State.'"[32] The Supreme Court further elaborated the interpretation of the Establishment Clause in *School District of Abington Township v. Schempp*.[33] The *Schempp* case involved religious exercises in public schools, but broadly held the Establishment Clause to bar any legislation lacking a "secular legislative purpose" and having a "primary effect that advances or inhibits religion."[34]

In 1968, the Pennsylvania Nonpublic Education and Secondary Education Act was adopted in Pennsylvania to provide for state use of public funds to purchase secular educational services from nonpublic, including religious, schools.[35] The legislation was challenged in federal court as violative of the *Everson* "no aid" interpretation of the Establishment Clause.[36] In *Lemon v.*

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30. *Springfield Sch. Dist.*, 397 A.2d at 1170 (quoting Wiest v. Mt. Lebanon Sch. Dist., 320 A.2d at 366).

31. 330 U.S. 1, 16 (1974)(quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

32. *Id.*

33. 374 U.S. 203 (1963).

34. *Id.* at 222.

35. PA. STAT. ANN. tit. 24, §§ 5601-5608 (repealed 1977). The Act provided that the state would pay the salaries of teachers in nonpublic schools for instruction rendered in mathematics, modern foreign languages, physical science and physical education. The state would also pay for secular textbooks and instructional materials in those subjects. *Id.*

36. Lemon v. Kurtzman, 403 U.S. 602 (1971).

Kurtzman[37] the Supreme Court of the United States held not only that the Act violated *Everson*'s interpretation, but also that it violated the Establishment Clause on a ground first articulated only the year previous in a case involving property tax exemptions of religious institutions.[38] The court had held, in this tax exemption case, that the legislation transgressed the Establishment Clause by creating excessive entanglements between government and religious institutions.[39] The Pennsylvania act, said the *Lemon* Court, created "excessive entanglements" of three kinds: (1) the state would have to monitor the classrooms of aided students to assure the "secular" subjects were taught without infusion of religion; (2) the state would have to audit a church-related schools' financial records to determine which of its expenditures were religious; and (3) the fact that the Act had been generated by political activity, and future appropriations under it would invoke such activity, created "potential division along religious lines."[40]

The "no aid," "purpose and effect," and "excessive entanglements" thrusts of *Everson*, *Schempp* and *Lemon* continued in a series of U.S. Supreme Court decisions striking down legislation aimed at providing state subsidies to religious institutions for educational purposes.[41]

2. The cases on aid to individuals.—A parallel line of decisions from 1947 to the present holds that the Establishment Clause is not violated where government supports public objectives by affording material aid to individuals exercising a choice to be served by religious educational institutions. While *Everson* is

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37. *Id.*

38. *See* Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970).

39. *Id.* at 675.

40. *Lemon*, 403 U.S. at 622-23.

41. Sloan v. Lemon, 413 U.S. 825 (1973) (state reimbursement of tuition exclusively to parents of nonpublic school students); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)(tuition grants and other benefits limited exclusively to parents of children attending nonpublic schools); Meek v. Pittenger, 421 U.S. 349 (1975)(state-provided auxiliary services and loans of instructional materials and equipment to nonpublic schools); Wolman v. Walter, 433 U.S. 229 (1977)(loan of materials exclusively to nonpublic schools); School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985)(state payment of public school employees for secular educational services rendered on religious school premises); Aguilar v. Felton, 473 U.S. 402 (1985)(federal funding of public employees offering, on nonpublic school premises, supplemental educational programs to educationally deprived children from low-income families).

famous for its dictum proclaiming a wall of church-state separation,[42] its precise holding was that tax-supported bus transportation could validly be furnished to children in religious schools, even delivering them to the very school door.[43] The decision held that Establishment Clause considerations must yield to the commanding principles of the Free Exercise Clause.[44] The Court summarized its point noting that while tax-raised funds may not be used to support "an institution which teaches the tenets and faith of any church," the Free Exercise Clause commands that government "cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation."[45]

Following this teaching was the Court's 1968 decision in *Board of Education v. Allen*,[46] which addressed the constitutionality of a state's loan of textbooks to nonpublic school children.[47] The Court noted that the program served the public purpose of aiding the education of children and that they, not the schools they attended, were the program's primary beneficiaries.[48] Additionally, the court noted that the loan of textbooks by the state was a general program, adding nonpublic school children to the existing class of public school beneficiaries and that the books loaned were secular in content.[49]

In 1983 in *Mueller v. Allen*,[50] the Court held that a Minnesota statute providing tax deductions by parents for public and nonpublic school expenses did not violate the Establishment Clause.[51] These expenses included broadly defined tuition, textbook and transportation costs.[52] Applying the *Schempp* "purpose and effect" test, the Court stated, in reference to purpose:

> A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools

42. 330 U.S. 1 (1974).
43. *Id.* at 18.
44. *Id.* at 16.
45. *Id.*
46. 392 U.S. 236 (1968).
47. *Id.*
48. *Id.* at 243-44.
49. *Id.* at 245.
50. 463 U.S. 388 (1983).
51. *Id.* at 403.
52. *Id.* at 390 nn.1-2.

> their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students, such schools relieve public schools of a correspondingly great burden to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools in a manner analogous to the "TVA yardstick" for private power companies.[53]

Nor did the Court find any defect in the statute under the "primary effect" wing of the *Schempp* test.[54] The court noted that the deduction was available to both public and nonpublic school parents[55] and that whatever assistance it may have afforded to religious schools, "under Minnesota's arrangement public funds become available only as a result of numerous private choices of individual parents of school-age children."[56] Thus, any "imprimatur of State approval" was avoided.[57] In addition, the Court did not find an excessive state entanglement with religion in the statute.[58]

In 1986, the Court continued the *Everson-Allen-Mueller* line of development in *Witters v. Washington Department of Services for the Blind.*[59] In *Witters*, a blind student sought public money, under Washington's vocational rehabilitation program, for his education at a Bible institute.[60] A unanimous Supreme Court held that the state could pay his tuition without violating the Establishment Clause.[61] Central to the Court's thinking was the fact that no "direct subsidy" to the Bible school was involved.[62]

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53. *Id.* at 395.
54. *Id.* at 396.
55. *Id.* at 397.
56. *Mueller*, 463 U.S. at 399.
57. *Id.* (quoting Widmar v. Vincent, 454 U.S. 263, 274 (1981)).
58. *Id.*
59. 474 U.S. 481 (1986).
60. *Id.*
61. *Id.* at 482.
62. *Id.* at 487.

Instead, like the busing program in *Everson*, a public welfare benefit was being made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted."[63] Then, in 1993, in *Zobrest v. Catalina Foothills School District*,[64] the Court upheld, over an Establishment Clause objection, a state's use of tax funds to support the services of a sign language interpreter to a deaf high school student on the premises of a religious school.[65]

Thus, under the federal constitution, direct subsidy of religious institutions is prohibited by the Establishment Clause, while tax-supported pubic interest programs, benefitting individuals and achieved in religious institutions, are valid where: (a) the individual and not the institution is the primary beneficiary of the aid; (b) when it is the individual's choice, not that of government, which triggers the aid; (c) the governmental program provides benefits to a broad class of citizens; and (d) the program is religiously "neutral." This neutrality requires that the program not be primarily religious in character, create no greater or broader benefits to recipients who apply their aid to religious education, and not limit the benefits in whole or part to students at religious institutions.

The federal Establishment Clause bears directly on questions arising, not only under Article I, Section 3, but also on the similar questions arising under other sections of the Constitution of Pennsylvania. The "parental choice" proposal appears to be a valid tax-supported public interest program similar to those previously approved by the Supreme Court. Therefore, the proposal must be deemed unobjectionable under the provisions of the Pennsylvania Constitution.

This conclusion is greatly strengthened by the reasoning of the Supreme Court of the United States in *Agostini v. Felton*.[66] There the Court held the *Aguilar* and *Grand Rapids* decisions to be "no longer good law" in light of *Zobrest*.[67] Thus, arguments by school choice opponents, based on those overruled decisions as guidelines

63. *Id.* (quoting Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 782-83 n.38 (1973)).

64. 113 S. Ct. 2462 (1993).

65. *Id.* at 2464.

66. 1997 WL 338583 (U.S.).

67. *Id.*

for interpretation of the Pennsylvania Constitution, would no longer appear useful.

B. Article III, Section 15: Public School Money

Article III, Section 15 of the Pennsylvania constitution provides, "No money raised for the support of the public schools of the Commonwealth shall be appropriated to or used for the support of any sectarian school."[68]2 The parental choice proposal clearly does not offend this provision of the constitution. The plain language[69] of Section 15 does not reach the parental choice provision. The voucher or educational opportunity grant does not consist of any money raised for the support of the public schools. Rather, it is money distinctly earmarked for parents and the support of their new, statutory power of school choice. That being so, no question logically arises with respect to whether or not that money would be "appropriated to or used for the support of any sectarian school."

Opponents of voucher legislation, seemingly ignoring the critical phrase "raised for the support of the public schools," characterize the legislation as calling for the support of sectarian schools. The argument is not new. In 1965, legislation enacted in Pennsylvania calling for the use of public funds to provide transportation to children attending nonpublic schools was challenged as violating *inter alia,* Article III, Section 15, but the challenge was unsuccessful.[70] The Supreme Court of Pennsylvania, in *Rhoades v. School District of Abington Township*,[71] held that the legislation did not involve the support of any sectarian school, even though payment for transportation of the religious school children was actually from money raised for the support of the public schools.[72] The court noted that, under existing law, "children in sectarian schools receive tax-supported health services."[73] The court pointed out further provisions of

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68. PA. CONST. art. III, § 15.

69. Under the Statutory Construction Act, "when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 PA. CONS. STAT. ANN. § 1921(b) (1995). The established rules of construction applicable to statutes apply also in the construction of the Constitution. Peoples Bridge Co. v. Shroyer, 58 Dauph. 25 (1946), *aff'd*, 50 A.2d 499 (1947).

70. Rhoades v. School Dist. of Abington Township, 226 A.2d 53 (1967).

71. *Id.*

72. *Id.* at 65.

73. *Id.*

Pennsylvania statutes conferring tax-supported benefits to nonpublic school children:

> The Public School Code provides for children, without distinguishing between public and nonpublic schools, many facilities, as, for instance, medical, dental and nurse services (§ 14-1401 *et seq.*); driver safety (§ 15-1519); food and milk supply (§ 13-1335): board and lodging (§ 13-1367), tuition and maintenance of blind, deaf and cerebral palsied children (§ 13-1376). The Public School Code provides that school district funds may be used for traffic safety purposes: "The board of directors of any school district acting alone or with another district or districts, may contribute funds to another political subdivision for the blinkers or other like traffic control devices." (1949, March 10, P.L. § 526, added 1965, Dec. 1, P.L. 1002, § 124 P.S. § 5-526).
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> On the basis of logic and sustained reasoning it would be absurd to allow nonpublic school children into all these public services but deny them a ride on a bus to attend a school conforming to the requirements of the State education program.[74]

The Court went so far as to say that "[w]here children are involved, the laws of the Commonwealth make no distinction between public school and nonpublic school pupils."[75] Whatever other objections may be raised to the "parental choice" legislation, Article III, Section 15 does not stand as a bar.

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74. *Id.* at 59.

75. Id. at 58. In 1995, payments by Commonwealth agencies for individual educational purposes included: payments under the Urban and Rural Teacher Loan Forgiveness Act, PA. STAT. ANN. tit. 24, §§ 5191-5197 (1992); for educational costs for dependent and delinquent children in private residential institutions, PA. STAT. ANN. tit. 24, § 9-964.1; for education and training of children found to be uneducable in the public schools, PA .STAT. ANN. tit. 24, § 13-1375; for tuition of exceptional children in approved private schools, PA. STAT. ANN. tit. 24, § 13-1376; for tuition of deaf and blind children in chartered schools, PA. STAT. ANN. tit. 24, § 13-1376.1; for tuition of cerebral palsied, brain-damaged, muscular dystrophied, socially or emotionally disturbed, or mentally retarded children in special institutions, PA. STAT. ANN. tit. 24, § 13-1377; for the education of blind children under 8 years if age, PA. STAT. ANN. tit. 24, § 13-1380; for tuition by school districts for attendance by a student in another district, PA. STAT. ANN. tit. 24, § 13-1313; PA. STAT. ANN. tit. 24, § 16-1608; PA. STAT. ANN. tit. 24, § 25-2562; payments by Pennsylvania school districts of tuition for a resident student attending school in another state, PA. STAT. ANN. tit. 24, § 13-1315; by school district of tuition for expelled students, 22 PA. CODE § 12.6(e)(2)(1995); to parents for costs of transporting their children to and from schools, PA. STAT. ANN. tit. 24, § 13-1362; by counties for tuition for children in orphanages or children's homes, PA. STAT. ANN. tit. 24, § 1307; payments of tuition for vocational education, PA. STAT. ANN. tit. 24, § 18-1809.

C. *Article III, Section 29: Aid to Persons for Public Purposes*

Article III, Section 29, is frequently cited by opponents of programs that aid parents in educating their children in religious schools. Specifically, opponents cite to the words of Section 29 which state that "No appropriation shall be made for charitable, educational, or benevolent purposes to any person or community nor to any denominational and sectarian institution, corporation or association."[76]

At the outset, it should be noted that the "school choice" proposal does not involve any appropriation to any person. The debates at the 1872 constitutional convention show, the phrase "any person or community" was regarded as distinct from the phrase respecting "any denominational or sectarian institution."[77] As Delegate Ewing stated, "[t]here is a marked distinction between appropriations for aid to sectarian or denominational institutions and appropriations to 'persons and communities.'"[78] Delegate Dallas, in further comment on the "person or community" phrase, stated that "certainly it is not intended to provide that no appropriation shall be made to any person."[79] In fact, the phrase was intended to eliminate scandals created by the use of state treasury funds for purposes that served only individuals or localities and failed to benefit the statewide public interest.[80] As Delegate Mann explained, "[t]his section is simply . . . to prevent invidious appropriations to local individuals and communities."[81]

The delegates cited case after case in which pleaders for special interests had managed to obtain state money for private causes, worthless local enterprises,[82] or compensation to communities which had suffered from fires or natural disasters.[83] The special and narrow character of these appropriations prompted the convention to adopt the "person or community" language.[84]

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76. PA. CONST. art. III, § 29.

77. 2 DEBATES OF THE CONVENTION TO AMEND THE CONSTITUTION OF PENNSYLVANIA 648-95 (Harrisburg, Pa., Benjamin Singerly, State Printer, 1873)[hereinafter DEBATES].

78. *Id.* at 667.

79. *Id.* at 648.

80. *See id.* at 694.

81. *Id.*

82. *Id.* at 617.

83. DEBATES, *supra* note 77, at 649.

84. *See id.* at 670.

Consequently, the delegates, focusing on the purposes for which they would forbid appropriations to "any person or community," stressed their opposition to special appropriations even to these gratuities.[85] The delegates did not intend the provision's language to prevent the legislature from making appropriations to individuals or communities when such action is necessary to the performance of governmental duties.[86]

Critics also challenge the "school choice" proposal as calling for appropriations in violation of the second phrase of Section 29, which forbids appropriations to denominational or sectarian institutions.[87] Seventy-five years ago, in *Collins v. Kephart*,[88] the Pennsylvania Supreme Court held that the section was intended to "divorce, absolutely, church and state," and "to forbid the state from giving . . . any recognition to a religious sect or denomination, even in the fields of public charity and education."[89] In 1927 the court revisited the subject of devoting Commonwealth funds to sectarian institutions in *Collins v. Martin*,[90] a case involving an appropriation to the Department of Public Welfare to pay for the treatment of indigent persons in religious hospitals.[91] Here again, the court held the expenditure violated Section 29.[92]

In 1956 the Pennsylvania Supreme Court initiated a sharp departure from this absolutist reading of the section, which paralleled the similar departure of the Supreme Court of the United States from the total separationism expressed by Justice Black in *Everson*. The case, *Schade v. Allegheny County Institutional District*,[93] involved a challenge to payments of public funds made by a county institution district to ten sectarian institutions for the support of dependent and neglected children who had been placed in the institutions by order of a juvenile court.[94] The Pennsylvania Supreme Court held the district's payments did not violate Article III, Section 29.[95] The court held that, in effect, the

85. *See, e.g., id.* at 642.
86. *See, e.g., id.* at 641, 681-82.
87. PA. CONST. art. III, § 29.
88. 117 A. 440 (1921).
89. *Id.* at 441.
90. 139 A. 122 (1927).
91. *Id.*
92. *Id.* at 127.
93. 126 A.2d 911 (1956).
94. *Id.*
95. *Id.* at 914.

payments constituted "neither a charity nor a benevolence, but a governmental duty."[96] The court's decision also rested on two further points. First, the court explained that the Commonwealth could, without violating Section 29, purchase needed public services from qualified sectarian agencies:

> The Constitution does not prohibit the State or any of its agencies from doing business with denominational or sectarian institutions, nor from paying just debts to them when incurred at its direction or with its approval. Numerous cases can be readily visualized where such situation have occurred: i.e. payment of the bill of an injured employee to a sectarian hospital.[97]

Second, the court grounded its decision on the child benefit theory previously propounded by the United States Supreme Court in *Cochran v. Louisiana State Board of Education*.[98]

> All the plaintiffs proved was that the monies received by the defendant institutions were in partial reimbursement for the cost of room and board of such minors. The services had been rendered before partial payments on account of same was received. A considerable part of this money is recouped by the Juvenile Court from the parents of these minor wards. The balance of the funds so expended are, in legal effect, payments to the child—not the institution supporting and maintaining him or her.[99]

Schade, therefore, involved tax funds paid to institutions for services rendered by them in providing needed help for children. Twenty-one years later, the *Rhoades* decision would rely upon *Schade* in upholding the use of public funds for bus transportation to children attending religious schools.[100]

In 1979, in *Springfield School District v. Department of Education*,[101] the Pennsylvania Supreme Court expanded the teaching of both *Schade* and *Rhoades* in a case challenging an amendment to the *Rhoades* busing law which expanded the area of bus transportation of religious school children beyond school

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96. *Id.*

97. *Id.* (quoting Cochran v. Board of Educ., 281 U.S. 370, 374-5 (1980)).

98. 281 U.S. 370, 375 (1930).

99. *Schade*, 126 A.2d at 914.

100. Rhoades v. School Dist. of Abington Township, 226 A.2d 53 (1967). *See supra* notes 70-74 and accompanying text.

101. 397 A.2d 1154 (1979).

district boundary lines.[102] In upholding the amended statute in the face of both federal and state constitutional objections, the court rejected the concept of an absolute "wall of separation" of church and state in favor of the concept of "benevolent neutrality."[103] The latter concept, the court explained, "does not require a degree of governmental detachment whereby the state becomes the adversary of religion or insensitive to its needs."[104] The Court turned to the precise holding of *Everson*:

> Thus governmental action is not necessarily prescribed because it results in a benefit to an institution, provided the benefit is indirect and incidental. *E.g., Everson v. Board of Education, supra.* Moreover, the determination as to whether a benefit is indirect and incidental is principally a question of degree.[105]

It appears, therefore, that in a case involving the application of Section 29 to the "school choice" proposal, the Pennsylvania courts will observe the same test that the Supreme Court of the United States has observed in Establishment Clause cases with similar facts. Under that test, the proposal will be upheld because: (1) the program is *general* in scope;[106] (2) because of the Commonwealth's supreme interest in the education of children and the *general* scope, the program serves an important public interest and, under the *Schempp* test, there can be no doubt that the program has a secular legislative purpose; (3) individuals, both children and their parents, will be the primary beneficiaries of the assistance provided by the program, and *their* choice triggers the aid; and, (4) while tuition money under the legislation would ultimately go to religious and other nonpublic schools, the program as a whole is not religious in character, nor does it create greater benefits to recipients who apply its aid to religious education, or limit the benefits to such students.[107]

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102. *Id.*

103. *Id.* at 1159.

104. *Id.*

105. *Id.*

106. The scope of the program is general if its benefits are being offered to children, and thus parents, in both public and nonpublic schools—the "broad class" deemed requisite in the legislation reviewed in *Board of Education v. Allen*, 392 U.S. 236 (1968), and *Mueller v. Allen*, 463 U.S. 388 (1983).

107. The education of the children who attend religious schools meets all legitimate secular education requirements. Although students in religious schools also receive religious education, it is not likely the "primary effect" of the proposed legislation. In other words, any aid to the school is an indirect, incidental and attenuated benefit to the school.

IV. Equality And Free Exercise Concerns

The resolution of *Everson* rested simultaneously on the Free Exercise Clause and the concept of equality of treatment that prohibits the government from allocating benefits on the basis of faith or lack of it. Neither the Pennsylvania constitution nor the United States Constitution would require voidance of the "parental choice" statute. The "parental choice" proposal, however, has the obvious aim of bringing its intended beneficiaries up to parity, both in benefits and in freedom to choose, with citizens who already enjoy those benefits through the tax-funded government schools. Neither the Supreme Court of the United States nor the Supreme Court of Pennsylvania has yet ruled in a case in which the parents of a child enrolled in a religious school have claimed that the denial, to that parent or child, of a specific public welfare benefit enjoyed by all public school parents and children was a denial of religious liberty or of equal protection of the laws. Should the "parental choice" proposal become law in Pennsylvania, it is foreseeable that litigants will make such a claim when defending that law.

The *Everson-Zobrest* sequence of holdings and the concept of equal treatment lend the argument plausibility. The parental choice proposal equalizes the benefits the government provides for the children in both public and nonpublic schools. To except the latter from the class of beneficiaries would amount to the creation of a governmental classification based on religion.[108] In 1975 former Chief Justice Burger, dissenting in *Meek v. Pittenger*,[109] pointed to a significant relationship between free exercise and equal protection concepts in words prophetic of the later decisions in *Mueller*, *Witters* and *Zobrest*:

> One can only hope that, at some future date, the Court will come to a more enlightened view of the First Amendment's guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic step toward establishing a state religion—at least while this Court sits.[110]

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108. Torcaso v. Watkins, 367 U.S. 488, 491-92 (1961); McDaniel v. Paty, 435 U.S. 618, 627 (1978).

109. Meek v. Pittenger, 421 U.S. 349 (1975).

110. *Id.* at 387.

This view, taken by the Supreme Court of United States in a challenge of the federal constitutionality of the parental choice legislation, would undoubtedly be taken by the Supreme Court of Pennsylvania as the standard to be followed under the Pennsylvania Constitution's equal protection clause, Article I, Section 26.[111]

Conclusion

While significant opposition to parental choice legislation exists in Pennsylvania, the opponents are unlikely to be successful in attacking such provisions using the identified provisions of the Pennsylvania Constitution. Instead, in light of prior, logical analysis of like or similar provisions in closely analogous situations, a parental choice provision will be able to withstand scrutiny by the Pennsylvania courts under the constitution of the Commonwealth of Pennsylvania.

111. Love v. Borough of Stroudsburg, 597 A.2d 1137 (1991).